(1) 88-258

Supreme Court, U.S.
FILED
AUG 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

HELMUT RAMPP,
LAYTON SORBER,

Appellant(s)

v.

GILBERT GLECO,
JEROME DOMKOWSKI,
DONALD BROBST,
SHICKSHINNY ZONING BOARD,
SHICKSHINNY BOROUGH COUNCIL,

Appellee(s)

ON APPEAL: from the United States Court of Appeals for the Third Circuit

APPELLANTS'
JURISDICTIONAL STATEMENT

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STATEMENT OF QUESTIONS PRESENTED ON APPEAL

1. Did the court below abuse its discretion by affirming the decision of the district court, and so sanction that decision denying the Appellant the Right to amend the complaint?

2. Did the court below abuse its discretion by affirming the decision of the district court, which by its operation did then effectively deny the Appellants their constitutionally guaranteed Right to a Jury Trial?

3. Did the court below abuse its discretion by affirming the decision of the district court, and in so doing, sanction the a criminal prosecution of the Appellant for a non-existent crime?

4. Did the court below abuse its discretion by affirming the decision of the district court, in allowing such court to rule contra to rules, statutes, and constitution?

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STATEMENT OF PARTIES TO THE ACTION IN THE COURT BELOW

In accordance with Local Rule 15(1)(b), the names of the parties to the action in the circuit court below are in fact set forth in the caption on the cover of this document.

STATEMENT OF REFERENCE TO OPINIONS BELOW

On the date September 24th, 1987, civil action number CV-0174 for the middle district of Pennsylvania, was dismissed per Kosik, J.

Subsequent to the order of dismissal dated September/24/1987, the Appellants did then file with the district court a motion for reconsideration, inter alia, making request for the court to allow an amended complaint to be filed. The district court, per Kosik, J., denied such motion by order of October/26/1987.

The Appellants in the interim, filed a Notice of Appeal, with the clerk of the district court, as evidence of the Appeal docketed in the circuit court at Appeal No. 87-5736 in and for the Third Circuit, on the date October/22/1987.

Subsequent to the filing of said Appeal in the Circuit Court, briefs were submitted and the Appeal went before a panel of circuit court Judges. The ruling of said panel was to affirm the decision of the district court without any further comment(no opinion was issued).

The date of the decision of the three judge panel affirming the decision of the district court was March/30/1988.

Subsequent to that decision, the Appellants then submitted a motion to the Third Circuit court of Appeals for rehearing by that court enbanc. An order then issued by the court denying the motion for re-hearing by the court enbanc on April/26/1988.

In addition to the motion of the Appellants for a rehearing by the court enbanc, the Appellants did in fact motion the Appellate court to at the very least, cause an opinion to issue, so as to alert the Appellant as to the legal rationale if any, that the three judge panel ulilized in affirming the dismissal of the action in the district court. No opinion was ever advanced or the existence of any opinion is still not known to exist.

STATEMENT OF GROUNDS OF JURISDICTION

This is a direct Appeal from a three Judge panel of a United States Circuit Court, to wit: Circuit Court of Appeals for the Third Circuit.

The action in the court below was in fact an appeal from a final decision of a United States District Court, i.e., United States District Court Middle District of Pennsylvania.

The jurisdictional basis for envoking the jurisdiction of the district court was based upon the following: Specifically, 28U.S.C.§1343 (a) (1)(2)(3)(4), and 42 U.S.C. §§ 1981; 1983; 1985; 1986; and 1988, respectively.

The date of the entry of judgment in the Circuit Court affirming the decision of the district court was March/30/1988. [appended infra]

The date of entry of the final decision of the Circuit Court, upon motion of the Appellants for rehearing and/or reconsideration, by the Court enbanc, was April/26/1988. [appended infra]

The date of the decision in the district court dismissing the action in that court was September/24/1987.

Subsequent to the dismissal of the action in the district court on Sept/24/1987, Appellants submitted to that court a motion for reconsideration, and for permission to amend the complaint. The same was denied by order of court dated, October/26/1987, per Kosik,J.

The Notice of Appeal regarding the judgment appealed from, was filed in the United States Court of Appeals, Third Circuit, July 22, 1988, with an Affidavit of service attached.

The Appeal in the Circuit Court was in fact filed in and for the Third Circuit, on the date, October/22/1987.

The action in the District was docketed at CV- 86-0174, Middle district of Pennsylvania. The Appeal in the Third Circuit was docketed in that Court at Appeal- 87-5736.

STATEMENT OF STATUTORY JURISDICTION

Statutory jurisdiction of this Court is envoked pursuant to Title 28 U.S.C. §§ 1253, and 2101(c).

Additionally, the jurisdiction of this Court is envoked pursuant to Title 42 U.S.C. §§ 1981; 1983; 1985; 1986; and 1988.

STATEMENT OF CONSTITUTIONAL PROVISIONS

The Constitutional provisions set forth in the Constitution of the United States, that of which, are the repository for certain unalienable rights are as follows, to wit:

> "No person shall. . . be deprived of life, liberty, or property, without due process of law. . . "
>
> U.S.C.A. Const. Amend. V

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,. . . "
>
> U.S.C.A. Const. Amend. VII

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> U.S.C.A. Const. Amend. IX

> "All persons. . . subject to the jurisdiction . . . of the United States [are entitled to]. . . due process of the law; [and] the equal protection of the laws."
>
> U.S.C.A. Const. Amend. XIV

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof;. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
>
> U.S.C.A. Const. Art. VI, Cl.2.

STATEMENT OF STATUTORY PROVISIONS

The right of trial by jury as set forth statutorily at Title 28 U.S.C. § 2072 ¶ 2, to wit:

> "[s]uch rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

the statute goes on to state;

> "[a]ll laws in conflict with such rules shall be of no further force or effect. . . [n]othing in this title, anything therein to the contrary notwithstanding shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the [SUPREME COURT]."
>
> Id. 28 U.S.C. § 2072 ¶3.

STATEMENT OF THE CASE

The inception date of the action in the district court was in fact February/06/1986.

The gravamen of the complaint filed in the district court sounded in the rights violations of the Appellant(Plaintiff therein)

Contrary to the law, the Appellant was in fact criminally tried in a state court of law for an alleged criminal violation of state law that of which does not exist.

The original complaint filed in the district court(CV-86-0174) contained allegations and/or averments referencing same.

From the very first day the case was docketed in the district court, there appeared in the caption of the complaint, and thereupon in each and every document filed in such case, a statement demanding a jury trial, e.g., "JURY TRIAL DEMANDED".

Upon filing of the complaint, the defendants therein(Appellees herein) filed with the district court motions to dismiss.

The motions to dismiss filed with the court were pursuant to the Fed.Rules of Civil Procedure 12 (b)(6), i. e., "failure to state a claim upon which relief can be granted".

Plaintiffs in that court responded with an appropriate brief to the contrary and at that stage of the proceedings the Plaintiffs prevailed.

At that particular juncture, the Chief Judge of that court, Nealon,C.J., issued an order of court stating that the complaint "[w]hile. . . confusing. . . satisfies the pleading requirements,[citation ommited], this court is not prepared to hold as a matter of law that plaintiffs can prove no set of facts which would support a cause of action." Said order of court is dated June/30/1986, and signed by Chief Judge Nealon. MDPA.

Thereafter, for a period of approximately twenty(20) months, the case went back and forth through a series of motions. Finally resulting in the dismissal of the action.

It is worthy of note at this juncture to bring to the attention of the instant court that while in the district court, the recusal of two judges from the case transpired. That point alone should suffice as to cast a grave shadow of doubt upon the ability of the judges in both the district court and the circuit court to function in an objective manner.

On the date September/24/1987, the case in the district court was dismissed by Judge Kosik, via. utilization of an opinion, that of which amounted to approx. twenty(20) pages.

Subsequent to the order dismissing that case the then plaintiffs moved the court, in a timely manner to reconsider the order of dismissal and to simultaneously grant the plaintiffs therein permission to amend the original complaint for the first time. The position of Judge Kosik was to deny such motion with a one page order, and to omnipotently deny the request to amend at the same time.

BEST AVAIL

The motion for reconsideration and to allow for an amended complaint also set forth in the same motion that such amendment would serve the ends of Judicial economy as well as to allow the Plaintiffs an opportunity to bette set forth any averments that of which were not clearly understood . The same was summarily dismissed per the order of court per Kosik, J. dated October/26/1987.

The Plaintiffs(Appellants herein) then filed with the Third Circuit Court of Appeals a notice of Appeal, and did in fact simultaneously serve notice of same upon the District Court, and each Defendant(Appellees herein). The Appeal docketed in the Appeals court had the number affixed to it, Appeal 87-5736, in and for the Third Circuit.

The issue(s) raised on that appeal were essentially the same as the issue(s) set forth on page one of this document, to wit: "STATEMENT OF QUESTIONS PRESENTED ON APPEAL".

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That Appeal was in fact heard on Briefs submitted. The outcome of that appeal was for the three judge panel of the Third Circuit to affirm the judgment of the District Court without further comment. (March/30/1988)

Thereupon the Appellants motioned the Court for a "Rehearing before the court enbanc and additionally for the court "enbanc" to cause an "opinion " to issue so as to enable the Appellants the right to view the courts rationale, if any there existed, that of which would , or could, be said to reasonably conform with other case presedents existing within the circuit.

The Circuit court denied the motion for "Rehearing before the court enbanc" per an order of court dated April/26/1988.

STATEMENT OF SUBSTANTIALITY OF ISSUE(S) AND MERITTING PLENARY CONSIDERATION

The plenary consideration of this court is of the utmost importance, as the issue(s) concerned are of a constitutional nature.

From the onset of the proceedings in the district court, and through the appellate court, the Appellants' have been denied their constitutional rights.

The organic law of our land affirms the existence of rights that were in existence antecedent to the inception of the document itself.

Additionally, the statutory construction as set forth above, buttresses, through the legislative process, the rights set forth in the Constitution.

The procession of the case in the courts below, has been for the most part, a steady, incessant, continuation of what can only be termed , the venting of Judicial Frustration at the expense of the Appellants.

The Appellees in the court below, seem to direct their attention to one of the comments made by judge Kosik, (judge,Middle Dist. Pa.) wherein he resorts to characterization of the original complaint of plaintiffs as "frivolous (remark in order of court of 24/Sept/1987)

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It is worthy of note, and additionally imperative to be brought to the attention of this court at this point in time, the fact that, while Judge Kosik, choose to make a comment as to the original complaint being "frivolous" it did in fact take the learned Judge approx. twenty(20) pages upon which to set forth with case law citation just what he ment by "frivolous". Additionally, for a case to remain before a Federal District Court for a period of twenty(20) months, that alone would suffice as to defeat any argument alleging the existence of a "frivolous" case.

The salient point to be noted herein, is the fact that the district court below, and the circuit court below have, for what ever reasons yet to surface, totally departed from ruling in accordance with the constitution, the statutes,and the rules of procedure, as promulgated by the instant court.

The substantiality of the issues presented are of such a very basic and fundamental nature there resolution must be resolved as a matter of right.

The circuit court below has in fact, ruled upon an appeal, that of which such court refuses to issue an opinion consistent with such ruling.

It would seem readily apparent from the manifest refusal of the circuit court to provide a legal opinion supportive of its decision, that there exists no legal basis for its rationale. Additionally, when confronted with the overwhelming body of statutory command, the unmistakable and resounding authority of the constitutionally mandated procedures, the ruling of the circuit court amounts to the antithesis of the precedents of the circuit itself.

It would seem that the high appellate courts are to function as guardians of justice in our society, however, in the instant case, the circuit court below has manifested a position and posture that of which, may reasonably be said to exist as the antithesis thereof.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-5736

RAMPP, HELMUT and
SORBER, LAYTON,
Appellants

vs.
GLECO, GILBERT
DOMKOWSKI, JEROME
BROBST, DONALD, ESQ
SHICKSHINNY ZONING BOARD and
SHICKSHINNY BOROUGH COUNCIL

On Appeal From the United States District Court
For The Middle District of Pennsylvania-Scranton
(D.C. Civil No. 86-0174)
District Judge: Honorable Edwin M. Kosik

Submitted March 18, 1988

BEFORE: STAPLETON, GREENBERG, and SCIRICA[Cir,JJ.]

JUDGMENT ORDER

After consideration of the contentions raised by Appellants, it is ORDERED and ADJUDGED that the judgemnt of the district court be and is hereby affirmed, Cist taxed against appellants.

BY THE COURT

/s/ Walter K. Stapleton
Circuit Judge

Dated: Mar 30 1988

ATTEST:
/s/ Sally Mrvos
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-5736

RAMPP, HELMUT and SORBER, LAYTON
Appellants

vs.

GLECO, GILBERT
DOMKOWSKI, JEROME
BROBST, DONALD, ESQ.
SHICKSHINNY ZONING BOARD and
SHICKSHINNY BOROUGH COUNCIL

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other judges of the Circuit in regular active service, and no judge concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ WALTER K. STAPLETON
Circuit Judge

Date: APL 26 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HELMUT RAMPP, LAYTON SORBER, Appellants,	:	NO. 87-5736
v.	:	
GILBERT GLECO, JEROME DOMKOWSKI, DONALD BROBST, SHICKSHINNY ZONING BOARD, SHICKSHINNY BOROUGH COUNCIL: Appellees	:	NOTICE OF APPEAL

COMES NOW, HELMUT RAMPP and LAYTON SORBER, and serves NOTICE upon this Court as follows:

1. That an APPEAL is taken to the Supreme Court of the United States, from the order of the United States Court of Appeals for the Third Circuit, entered in the above captioned case, on the date April 26th, 1988.

2. The parties to such Appeal will be as set forth above in the caption.

3. The APPEAL is taken to the Supreme Court of the United States, pursuant to Title 28 USC § 2101(c).

WHEREFORE, pursuant to law, and the rules of the Supreme Court, Notice is served upon this Court.

Respectfully Submitted

/s/ Helmut Rampp

/s/ Layton Sorber

Date: July/21/1988

RECEIVED AND FILED

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Sally Mrvos
Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HELMUT RAMPP, et al : NO. 86-0174
Plaintiffs :
:
v. :
:
GILBERT GLECO, et al : (Judge Kosik)
Defendants :

MEMORANDUM AND ORDER

Plaintiffs' pro se complaint was filed in the instant action on February 7, 1986. The underlying basis of plaintiffs' complaint was that the defendants wrongfully acted in concert to deny plaintiffs the ability to acquire a proper zoning/building permit so as to enable plaintiffs to erect a building on plaintiffs' lot in the Borough of Shickshinny, Pennsylvania. As to the specific allegations, Count I raises allegations of false arrest of plaintiff Layton Sorber by defendant Domkowski; Count II alleges tortious interference with plaintiffs' contract and interference with prospective advantage against all defendants; and Count III alleges "malicious deprivation of constitutional rights." While plaintiffs fail to set forth any specific constitutional violations, in a section of the

complaint marked "statement of jurisdiction," plaintiffs make reference to 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988. The plaintiffs seek compensatory and punitive damages from each defendant in an amount in excess of ten thousand ($10,000.00) dollars.

Defendants filed motions to dismiss, which were denied by the court in a Memorandum and Order dated June 30, 1986[1]. [foot note omitted] Thereafter, answers to plaintiffs' complaint were filed by the defendants. Various other preliminary motions were filed by the plaintiffs and disposed of by the court in Memorandum and Orders dated December 5, 1986 and February 3, 1987. Motions for summary judgment have been filed by all of the defendants along with the appropriate briefs. Plaintiffs have filed opposition briefs and the matters are now ripe for disposition.

A review of the documents submitted by the parties indicates that the following events are the basis for the instant action:

On June 19, 1984, the Luzerne County Redevelopment Authority conveyed a parcel of land known as 5-7 East Union Street, Borough of Shickshinny, Pennsylvania, County of Luzerne, to plaintiff Layton Sorber and Geraldine Sorber, his wife. The property was conveyed subject to the condition that the land be developed within a certain period of time. Defendant Gleco, who was building inspector for Shickshinny Borough, knew that the property had been part of a redevelopment project and that when the Redevelopment Authority conveyed its land, it was conveyed subject to the condition that the land be developed within a certain amount of time.

On May 15, 1985, plaintiff Sorber contacted defendant Gleco, and as a result of their meeting, a building permit was issued. However, prior to issuing the permit, defendant Gleco inquired from plaintiff Sorber if he had sstisfied all of the requirements of the Redevelopment Authority, and plaintiff Sorber responded affirmatively.

Subsequent thereto, defendant Gleco had second thoughts as to whether or not he should have issued the permit to plaintiff Sorber. He therefore contacted the Borough Solicitor, defendant Brobst, for advice.[2] [foot note omitted]

Defendant Brobst, after discussing the matter with the Solicitor for the County Redevelopment Authority, informed defendant Gleco that there was a condition in the Sorber deed that title would revert to the Redevelopment Authority if construction was not completed by a certain date. Defendant Brobst also advised defendant Gleco that construction had not, in fact, been completed by the time period prescribed and that the date hade not been extended by the Authority.

As a result of the information acquired from defendant Brobst, the permit, which was previously issued to plaintiff Sorber on May 15 1985, was immediately revoked. Defendant Gleco prepared a revocation of the building permit which was delivered to plaintiff Sorber.[3] [foot note omitted]

On July 1, 1985, defendant Domkowski, then Police Chief of the Borough of Shickshinny,

received a complaint that plaintiff Sorber was beginning construction on the property located at 5-7 East Union Street. Upon receiving said complaint, defendant Domkowski proceeded to the property in his police vehicle, and thereupon observed construction activity taking place. Defendant Domkowski ascertained that plaintiff Sorber was present at the construction site and was responsible for the construction. He also learned that plaintiff Sorber did not have a building permit from the Borough of Shickshinny to engage in the construction upon the property. He then ordered construction work stopped pursuant to the posted "stop work order."

Thereafter, plaintiff Sorber accompanied defendant Domkowski to the police station.[4] [foot note omitted] At the station, defendant Domkowski made several telephone calls to Luzerne County Redevelopment Authority and to the Borough of Shickshinny officials. Defendant Domkowski ascertained that plaintiff Sorber did not have authority from the

Luzerne County Redevelopment Authority at that time to engage in the construction at the property located at 5-7 East Union Street and that he was in violation of the Building Code of the Borough of Shickshinny in performing work without a building permit and after a stop work order issued and posted.

On July 5, 1985, defendant Domkowski had a Criminal complaint filed and served upon plaintiff Sorber for violations of § 122.3 and § 123.2 of the B.O.A.C. Building Code. A hearing on the criminal complaint was held before a Magistrate on November 22, 1985. Upon conclusion of the testimony, the Magistrate dismissed the charges against plaintiff Sorber.

Plaintiff Sorber also filed an appeal of defendant Gleco's denial of his application of a permit with the Shickshinny Hearing Board. Following a hearing on October 30, 1985, plaintiff Sorber's request was denied.[5]
[foot note omitted]

As a result of the above events, on February 7, 1986, the plaintiffs, Helmut Rampp[6] and Layton Sorber , filed a complaint against Gilbert Cleco; Jerome Domkowski; Donald Brobst; Shickshinny Zoning Board; Shickshinny Borough Council alleging purported violations of 42 U.S.C. §§ 1981. 1983, 1985, 1986 and 1988. Additionally, plaintiffs appear in their complaint to request this court to assert pendent jurisdiction with respect to various state claims which include a claim for false arrest and a claim for tortious interference with contract and interference with prospective advantage.

We will now address each of the defendants' motions for summary judgment. In doing so the court is cognizant of the fact that because plaintiffs are proceeding pro se, we must view the complaint with great liberality.

Summary judgment is appropriate only when there is no genuine issue of material fact to be resolved. Fed.R.Civ.P. 56. Peterson v. Lehigh Vally Dist Council, 676 F. 2d 81 84 (3rd Cir. 1982);

Continental Ins. v. Bodie, 682 F. 2d 436, 438 (3rd Cir. 1982): All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. The entire record must be examined in light most favorable to the non-moving party. Continental Ins. v., Supra. Additionally, the Supreme Court has recently ruled that Fed.R. Civ. P. 56(c) "mandates the entry of summary judgment, after adaquate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, ___U.S. ___, ___,106 S.Ct. 2548, 2552-2553(1986). The Court further stated that "Rule 56(c) . . . requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' "Id. at ___,106 S.Ct. at 2553.

MOTION OF DEFENDANTS GLECO, SHICKSHINNY ZONING BOARD AND SHICKSHINNY BOROUGH COUNCIL FOR SUMMARY JUDGMENT

A review of the plaintiffs' complaint indicates that the allegations against the defendants, Gilbert Gleco, Shickshinny Zoning Board, and Shickshinny Borough Council are based on an alleged conspiracy whereby defendant Gleco denied and deprived plaintiff of a proper building and/or zoning permit. Plaintiffs' claims are brought pursuant to 42 U.S.C. §§1981 1983, 1985, 1986 and 1988. Plaintiffs also includ a Count III captioned "Malicious Deprivation of Constitutional Rights" in which they allege violations of their guaranteed constitutional rights in general.

On February 4, 1987, defendants Gleco, Shickshinny Zoning Board and Shickshinny Borough Council filed a notice and motion for summary judgment, a brief and affidavits in support thereof. On February 24, 1987, plaintiffs filed an opposition brief and supporting documents. Because the plaintiffs are acting pro se in this matter, we will review their allegations with great liberality

and we will consider any possible cause of action which they may have set forth.

We will begin our analysis by determining whether plaintiffs have set forth a cognizable action under 42 U.S.C. § 1981. In essence, 42 U.S.C. §1981 forbids all "racial" discrimination in the making of private and public contracts and in the enforcement of legal proceedings. In Saint Francis College v. Al-Khazaraju., ___,U.S.___, 107 S. Ct. 2022 (1987) the Supreme Court, after reviewing the history of §1981, concluded that Congress intended to protect from discrimination identifiable classes of persons who are subject to intentional discrimination solely because of their ancestry or ethnic characteristics.

While it is not disputed that plaintiffs are members of the German race, nowhere in their complaint do they aver that they were subjected to intentional discrimination by defendants solely because of their German ancestry or ethnic characteristics. In fact, the only mention of plaintiffs' complaint (Document 1) wherein plaintiff Rampp advises the Deputy

Excutive Director of BOCA International, Inc. that he "can read your code book myself since I an a Germen imigrant [sic] and accustomed to a dictionary." Accordingly, we find that plaintiffs have failed to set forth a cause of action under 42 U.S.C. §1981.

We will nest consider whether plaintiffs have set forth a viable cause of action under 42 USC §1983. While plaintiffs fail to specifically allege of which constitutional rights they were deprived by the defendants, the plaintiffs complaint does include a reference to denial of due process of law.[7] [foot note omitted]

Essentially, plaintiffs' averments all arise out of the defendants, Gleco, Shickshinny Zoning Board and Shickshinny Borough Councils' alleged denying and depriving "plaintiffs the ability to acquire the proper building permit, and/or zoning permit, so as to enable plaintiffs to erect a building on plaintiffs' lot in the Borough of Shickshinny, Pennsylvania."

Initially, we would like to note that the mere denial of a zoning and/or building permit does not give rise to a constitutional violation

in that federal courts do not sit as a super zoning board or a zoning board of appeals. Raskiewicz v. Town of New Boston, 754 F. 2d 38, 44 (1st Cir. 1985) cert. denied 106 S.Ct. 135.[8] [foot note omitted] Thus, where the state offers an extensive scheme of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of 42 U.S.C. §1983. See Raskiewicz, supra. A review of the affidavits of Gilbert Gleco and Donald Brobst[9] submitted in support of their motions for summary judgment[10] indicates that on May 15, 1985, plaintiff Sorber approached defendant Gleco and asked for a building permit for his property located at 5-7 East Union Street Shickshinny, Pennyslvania. The permit was issued; however, it was revoked the following day. A "stop work notice" was posted on the property on May 17, 1985. The reason for the revocation of plaintiffs' permit was that he had not submitted his building plans to the

Building Inspector for approval, he had not applied for zoning approval, which was a pre-requisite for the issuance of a building permit, and his right to continued possession of the property and to sonstruct on the property was in question since he had not been granted an extension to develop the property by the Redevelopment Authority.

Initially, the plaintiff chose to pursue his administrative remedies. Plaintiff Sorber appealed the denial of his zoning permit to the Shickshinny Zoning Hearing Board. A hearing was held before the Zoning Board on October 30, 1985 on plaintiff's request. At the conclusion of the hearing, the Board denied plaintiff's request for variances in an Opinion and Decision of the Zoning Hearing Board dated November 26, 1985. Plaintiff Sorber did not appeal the Zoning Hearing Board's decision to the Court of Common Pleas.

On May 21, 1986, plaintiff filed a mandamus action in the Court of Common Pleas of Luzerne County.

However, the mandamus action was dismissed by the court in an Order dated October 8, 1986 in which plaintiff was given twenty[20] days in which to file an amended complaint. Plaintiff never filed an amended complaint, not did he appeal the court's order.

Plaintiff Sorber then submitted revised zoning and building applications, along with accompanying plans. He also obtained an extension of time from the Luzerne County Redevelopmer Authority and approval from the Luzerne County Conservation District. The plaintiff was issued a building permit on January 16, 1987.

We will now consider whether plaintiffs' complaint establishes a claim for denial of substantive or procedural due process of law. In considering the question of the denial of substantive due process in the issuance of permits we will look to the Pennsylvania Municipalities Planning Code, 53 P.S. §10601 et seq., and the zoning Ordinance of the Borough of Shickshinny.[11] [foot note omitted] "The test for determining whether a law comports with substantive due process is

whether the law is rationally related to a legitimate state interest. '[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might that the particular legislative measure was a rational way to correct it.' " Pace Resources, Inc. v. Shrewsbury Township, No. 86-5210, Slip.Op. (3rd Cir. January 12, 1987), citing Rogin v. Bensalem Township, 616 F. 2d 680, 689 (3rd Cir. 1980), cert. denied 450 U.S. 1029 (1981).

While wa do not believe it si necessary to set forth a detailed analysis of the aforesaid zoning provisions, we believe that the requirements of the Code and implementing Ordinance, and in particular those sections dealing with the issuance of permits are a rational and reasonable means to promote, protect and facilitate the public health, safety, and general welfare of citizens of the Commonwealth. Additionally, in addressing the plaintiffs' substantive due process claim, this court must also determine whether in accepting the

allegations in plaintiffs' complaint, as well as all supporting documents in the light most favorable to plaintiffs. the failure of the defendants Gleco, Borough of Shickshinny and Shickshinny Zoning Board to issue a permit to plaintiffs was the result of an abuse of governmental power sufficient to raise it to the stature of a constitutional violation. Rymer v. Douglas County, 764 F.2d 796 (11th Cir. 1985) We find that it was not. While substantive due process protects a general right of an individual to be free from the abuse of governmental power Rymer, supra, we do not believe such abuse exists in this case. As the defendants' affidavits and supporting documents indicate, the plaintiffs' failed to comply with the provisions of the zoning ordinance. While plaintiffs do deny these allegations, they fail to provide any supporting documentation to rebut defendants' assertions.[12] [foot note omitted] Because we find that no "question of material fact" exists as to the denial of plaintiffs' permit and because we determine that the actions of the Borough defendants and their

official did not rise to the level of abuse of governmental power, we cannot find any denial of plaintiffs' substantive due process rights. Likewise, wa cannot find that plaintiffs were denied procedural due process. 53 P.S. §10901 et seq. provides for the creation of a zoning hearing board which hears appeals from decisions of zoning officers.[13] [foot note omitted] Further, there is provision for judicial appeals of zoning board decisions.[14] [foot note omitted] Thus, we find that the Pennsylvania Municipalities Planning Code satisfies the requirements of procedural due process. See Rogin v. Bensalem Township, supra; Hudson v. Palmer, ___U.S.___, 104 S.Ct.3194, 82 L.Ed 393 (1984). The fact that the plaintiff have failed to take full advantage of this process or that plaintiffs have failed to specifically allege that the permit and appellate procedures were constitutionally deficient warrants our conclusion that plaintiffs have failed to state a valid procedural due process claim.

In the final analysis, we believe that the plaintiffs may have been subjected to an uncertain and perhaps frustrating administration of a local regulation, they have not been deprived of a property interest without due process of the law. Accordingly, we find that the plaintiffs have failed to set forth any cognizable claims under 42 U.S.C. § 1983.

We will now consider whether plaintiffs have established a viable calim under 42 U.S.C. § 1985 and §1986. While plaintiffs do not specifically allege under what subparagraphs [1] and [2] dealing with preventing an officer from performing duties and obstructing justice, intimidating party, witness or juror are applicable to the instant situation. Thus we will determine whether plaintiffs have established a violation under 42 U.S.C. §1985(3).

"Section 1985(3) establishes a cause of action against any person who enters into a private conspiracy for the purpose of depriving the claimant of the equal protection of the laws. Section 1986 is a companion to § 1985(3) and provides the claimant with a

Cause of action against any person who, knowing that a violation of §1985 is about to be committed and possessing power to prevent its occurence, fails to take action to frustrate its execution. Because transgressions of §1986 by definition depend upon preexisting violations of §1985, if the claimant does not set forth a cause of action under the latter, its claim under the former necessarily must fail also." Rogin v. Bensalem Township, supra. at 696.

Further, 42 U.S.C. §1985(3) applies only to private conspiracies predicated on racial or perhaps otherwise class based insidiously discriminatory animus. As pointed out above, when we discussed plaintiffs' §1981 allegation while it is not disputed that plaintiffs are members of the German race, nowhere in their complaint do they aver that they were subjected to intentional discrimination by defands solely because of their German ancestry or ethnic characteristics. The only place where a "class based" mention of plaintiffs' ancestry could possibly be found is in a letter

at Appendix 26A of plaintiffs' complaint (Document 1), wherein plaintiff Rampp advises the Deputy Executive Director of BOCA International, Inc. that he "can read your code book myself since I am a German imigrant[sic] and accustomed to a dictionary." In fact, while plaintiffs' accuse the defendants of engaging in a conspiracy to deprive them of a permit, all of plaintiffs' allegations are directed toward alleged animosity toward plaintiffs as individuals, not on any class-based insidiously discriminatory animus.[15] [foot note omitted] Accordingly, we find that plaintiffs have not stated a cause of action under §1985(3) and §1986.

Based on the above reasoning, we cannot find that plaintiffs have established cognizable claims under 42 U.S.C. §§1981, 1983, 1985 and 1986. Accordingly, defendants Gleco, Shickshinny Zoning Board and Shickshinny Borough Council's motion for summary judgment will be granted. Finally, plaintiffs request that attorneys fees be awarded under 42 U.S.C. §1988

Because we find this request to be unwarranted in light of our previous rulings, this request will be denied.

MOTION OF DEFENDANT JEROME L. DOMKOWSKI FOR SUMMARY JUDGMENT.

The plaintiffs' allegations against defendant Domkowski charge that defendant Domkowski, in addition to being involved in the aforesaid conspiracy to deprive plaintiffs of proper permits, also falsely arrested and maliciously prosecuted plaintiff Sorber [Count I]

As pointed out above, we do not believe that defendants' denial of plaintiffs' permit rose to the level of a constitutional violation under 42 U.S.C. §§1981, 1983, 1985, and 1986. Accordingly, defendant Domkowski's motion for summary judgment based on the alleged conspiracy violations will be granted.

We will nest consider the plaintiffs' allegations of false arrest. While it is true that the filing of charges without probable cause and for reasons of personal animosity are actionalbe under 42 U.S.C. §1093, Losch v. Borough of Parkesburg, Pa., 736 F.2d 903(3rd. Cir. 1984)

an initial determination must be made whether the defendant had probable cause to institute the criminal charges. Additionally, when dealing with a police officer defendant, the court must consider the question of qualified immunity, as addressed by the United States Supreme Court in Malley v. Briggs, 475 U.S.335, 106 S.Ct. 1092, (1986). In Malley v. Briggs, supra, the Supreme Court addressed the issue of the degree of immunity accordee a defendant police officer in a damages action under 42 U.S.C. §1983 when it was allered that the police officer caused the plaintiff to be unconstitutionally arrested by presenting a judge with a complaint and supporting affidavit which failed to establish probable cause. The court held that "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable' " will the officers shield of qualified immunity be lost. Malley, supra, at ___, 1098. Thus, we will look to the

documents submitted by the parties on the question of false arrest to determine if a genuine issue of material fact exists on the question of probable cause.[16] [foot note omitt] Initially, plaintiff Sorber admits in his complaint that on July 1, 1985, he initiated work in the Borough of Shickshinny. He asserts that he involuntarily accompanied defendant Domkowski to police headquarters and that on July 5, 1985, he received a criminal complaint asserting violations of the BOCA Building Code.

Further, he avers that he was found not guilty at a hearing before a district justice. The affidavit of defendant Domkowski[17] [foot note omitted] indicates that a stop work order was conspicuously posted on plaintiff's property at 5-7 East Union Street in Shickshinny. On July 1, 1985, defendant Domkowski recieved notice that Sorber was initiating construction at the property and that upon arriving at the property he personally observed the construction activity. Plaintiff Sorber admitted that he did not habe a permit to

engage in construction on the property and defendant Domkowski ordered the work stopped. The affidavit avers that plaintiff Sorber voluntarily accompanied defendant Domkowski to the police station where defendant Domkowski made several phone calls to ascertain whether plaintiff had authority to engage in the construction. He futher informed plaintiff that if charges were to be filed, he would subsequently receive a criminal complaint. On July 5, 1985, a criminal complaint was served and filed.

A review of the counter-documents submitted by plaintiffs indicate that the only area of contention between the parties as to the facts surrounding the incidents of July 1, 1985, was the voluntariness of plaintiff in accompanying defendant Domkowski to the police station. However, we do not believe that this discrepancy has any effect on our determination of whether probable cause existed for the filing of charges against Sorber. Firts, it is not disputed that plaintiff's property was posted with a stop work order.

Secound, defendant observed plaintiff in the act of initiating construction and plaintiff admittedly had no building permit to proceed with construction. Thus, we find, as a matter of law, that defendant Domkowski had probable cause to file a criminal complaint on July 5, 1985, charging plaintiff Sorber with a violation of the BOCA Building Code for failure to secure a permit. The fact that the charges were subsequently dismissed by the District Magistrate[19] [foot note omitted] does not vitiate a finding of probable cause for the arrest. Accordingly, based on the record before us, we find that probable cause existed to initiate the charges for which plaintiff was arrested, and we believe that summary judgment should be entered for defendant Domkowski on the claims of false arrest.

Similarly, in order to set forth a cause of action for malicious prosecution under 42 USC § 1983, all of the elements of a malicious prosecution must be established , Bussard v. Neil, 616 F. Supp. 854(M.D. Pa. 1985).

Malicious prosecution can be established only if plaintiffs can prove [1] defendant initiated charges against them [2] without probable cause [3] out of malice or for a purpose other than bringingplaintiffs to justice and [4] that plaintiffs ultimately were acquitted of all charges. Bussard. supra, at 857.

As pointed out above, plaintiffs' claim against defendant Domkowski must fall on element [2]. Because we have alteady found as a matter of law that defendant Domkowski had probable cause to file criminal complaint against plaintiff Sorber, we will grant defendant Domkowski's motion for summary judgment on the claims of false arrest and malicious prosecution.

MOTION OF DEFENDANT DONALD BROBST FOR SUMMARY JUDGMENT

A review of the plaintiffs' complaint that the allegations against defendant Brobst are based [1] on his involvement in the aforesaid conspiracy to deprive plaintiffs of proper building and/or zoning permits, and [2] his involvement in the allered false arrest and malicious prosecution of plaintiff Sorber.

As with the other defendants, we find that plaintiffs have failed to establish a 42 USC §1985(3) conspiracy. While plaintiffs aver through their complaint and affidavits that defendant Brobst conspired with other defendants to deprive them of building and zoning permits and to secure an allegedly false arrest agsinst plaintiff Sorber, the law is clear that in order to state a claim under § 1985(3), a conspiracy must have been motivated by racial or other class-based animus. Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L.Ed.338 (1971). Here, plaintiffs allege that the actions of defendant Brobst weredue to his malicious intent against them personally, but they fail to allege any class-based invidiously discriminatory animus that would give rise to a cause of action under §1985(3). Thus, plaintiffs' conspiracy claims agsinst defendant Brobst likewise must fall.

Finally, we would like to again note that plaintiffs' documents filed in the instant action indicate that defendant Brobst has

allegedly been involved in a conflict of interest in the exercise of his duties as solicitor.[19] [foot note omitted] We will not address the merits of these allegations since we do not believe that they are sufficient to establish a constitutional violation, and we do not believe that this court is the proper forum to make a determination on the veracity of the claims.

Based on tht above reasoning and the authorities cited therein, we will grant the defendants' motion for summary judgment as to plaintiffs' claims raised under 42 USC §§1981, 1983, 1985, 1986, and 1988[20] [foot note omitted] Further, because of our findings on the summary judgment motions, all outstanding discovery motions will be denied. Lokewise, plaintiffs' motion to vacate and reverse ofr error in law the court's order of December 5, 1986 is denied.

PLAINTIFFS' STATE CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT AND INTERFERENCE WITH PROSPECTIVE ADVANTAGE [COUNTII]

Included in plaintiffs' complaint and marked as "Count II" are general allegations as to all

defendants wherein the plaintiffs aver that the defendants have interfered with the contract and prospective advantage of plaintiffs in derogation of an agreement between Rampp and Sorber and that this action has subjected plaintiffs' to the intentional infliction of emotional distress. Because we have found that the complaint sets forth no valid federal claims against the defendants, we will not retain pendent jurisdiction over any of the state claims asserted against the defendants. See United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct.1130, 16 L.Ed. 2d 218 (1966).

ORDER

NOW, THEREFORE, this 24 day of September, 1987, IT IS HEREBY ORDERED THAT:

[1] the motion for summary judgment of defendants Cleco, Shickshinny Zoning Board and Shickshinny Borough Council is granted;

[2] the motion for summary judgment of defendant Jerome L. Domkowski is granted;

[3] the motion for summary judgment of defendant Donald Brobst, Esq, is granted;

[4] all outstanding discovery motions are denied;

[5] the motion of plaintiffs to vacate and reverse for error in law the court's order of December 5, 1986 is denied;

[6] this court will not retain pendent jurisdiction over any of the state claims ;

[7] the clerk of Court is directed to close this case; and

[8] "[ANY APPEAL FROM THIS ORDER WILL BE DEEMED FRIVOLOUS, WITHOUT PROBABLE CAUSE AND NOT TAKEN IN GOOD FAITH.]"

/s/ Edwin M. Kosik
United States District Judge